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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARCOS EDUARDO MENDIOLA, Defendant and Appellant.	D045566 (Super. Ct. No. SCD176522)

APPEAL from a judgment of the Superior Court of San Diego County, John L. Davidson, Judge. Affirmed in part reversed in part.

A jury convicted Marcos Eduardo Mendiola of first degree murder (Pen. Code, § 187, subd. (a))[1] and carjacking (§ 215, subd. (a)). It found true allegations that in committing both crimes, Mendiola intentionally and personally discharged a firearm causing death (§ 12022.53, subd. (d)), and that he committed the murder for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22,

1 All references are to the Penal Code unless otherwise indicated.

subd. (b)(1)). The jury also returned a special circumstance finding that Mendiola committed the murder while engaged in the commission of the crime of robbery or carjacking (§ 190.2, subd. (a)(17)).

The trial court sentenced Mendiola to life in prison without possibility of parole on count 1 (murder) (§ 187, subd. (a)) pursuant to the section 190.2, subdivision (a)(17) special circumstance finding, and enhanced the sentence by an additional 35 years to life for the jury's other findings: 25 years to life for using a firearm to cause the death of another (§ 12022.53, subd. (d)), plus 10 years for committing the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Sentence on count 2 (carjacking) was stayed pursuant to section 654.

On appeal, Mendiola challenges the jury's findings on the criminal street gang enhancement and the special circumstance allegation, as well as his convictions on the underlying offenses. He makes three separate challenges with respect to the jury's finding under section 186.22, subdivision (b)(1) that he committed the murder for the benefit of a criminal street gang, contending that (i) the finding must be reversed because it is not supported by substantial evidence; (ii) the finding must be reversed because the court's instruction that the jury "should consider" expert testimony in evaluating the allegation was improper; and (iii) the court's imposition of a 10-year sentence enhancement to his life sentence based on the finding is improper under *People v. Lopez* (2005) 34 Cal.4th 1002, 1005 (*Lopez*). Mendiola further contends that his convictions must be reversed due to instructional error. He argues that the court did not fully instruct the jury on the applicable law, because although the jury was instructed that it could find

Mendiola did not have the requisite intent to commit either murder of carjacking based on his voluntary intoxication, it was not informed of alternate offenses, namely involuntary manslaughter and assault, that he could have committed had he lacked that intent. Finally Mendiola contends that the jury's special circumstance finding under section 190.2, subdivision (a)(17) that he committed the murder in the commission of a robbery or carjacking is fatally flawed because it could have been the result of a nonunanimous verdict and deviates from the charging document filed against him. After evaluating these challenges, we affirm the judgment in its entirety with the sole exception that we reverse the jury's finding on the section 186.22, subdivision (b)(1) criminal street gang allegation and strike the resulting 10-year sentence enhancement.

FACTS

During the night of July 30, 2003, Mendiola was smoking methamphetamine with friends at an apartment in the Meadowbrook apartment complex in San Diego. Mendiola, a member of the Paradise Hills street gang, was overheard "talking about [car]jacking [a] car and going [for] a ride . . . to shoot some fools from Lomita [Village]," a rival gang. Lending weight to his comments, Mendiola was holding a handgun he obtained during the night from his friend and fellow gang member, Arturo Aguilar.

Mendiola; his girlfriend, Jaime Albarran; and Aguilar left the apartment in the early morning hours of July 31, 2003. Soon after, Mendiola confronted Antonio Pagayon in the parking lot. Pagayon was delivering newspapers to the residents of the complex and had parked his car, a rented Ford Focus, in one of the nearby parking stalls. As Pagayon screamed "no, no, no," Mendiola shot him once in the chest, killing him. After

shooting Pagayon, Mendiola, along with Albarran and Aguilar, fled the scene in Pagayon's car.

Mendiola, Albarran and Aguilar abandoned the car about a mile and a half away. When the car was located and analyzed by police investigators, Mendiola's fingerprints were found inside, along with DNA evidence that matched the DNA profiles of Mendiola and Aguilar.

Acting on a tip, the police arrested Mendiola on the afternoon of the shooting at his residence. Mendiola agreed to speak to the detectives investigating Pagayon's murder and the resulting videotaped interview was shown to the jury. In the interview, after at first claiming not to have been involved, Mendiola admitted he shot Pagayon. He claimed he had not intended to shoot him, but just wanted "to scare him" by shooting in the air.

Mendiola testified differently at trial, claiming that he had just told the police what they wanted to hear in an effort to protect his girlfriend and two-year-old child. In his testimony, Mendiola again admitted that he was in the apartment complex at the time of the shooting. He claimed not to have seen the shooting, however. Instead, he testified that he "hopped in" Pagayon's car when he saw that the keys had been left inside. He then heard a gunshot, and saw "two Black males running South"; fearing for his safety, Mendiola told Aguilar and Albarran to get in the vehicle, and drove off. Mendiola testified he left the car on a nearby street because having "just stole[n] a car," he "got scared."

DISCUSSION

I

The Finding That Mendiola Committed the Murder for the Benefit a Criminal Street Gang Is Not Supported by Substantial Evidence

Mendiola claims that there was insufficient evidence to support the jury's finding that he committed the murder "for the benefit of, at the direction of, or in association with a[] criminal street gang." (§ 186.22, subds. (b)(1) & (d).) Specifically, Mendiola contends that the prosecution failed to prove that the Paradise Hills gang, to which he admittedly belonged, was a "criminal street gang" as that term is statutorily defined. After reviewing the record, we agree with Mendiola's contention.

A

Applicable Legal Principles

A "'criminal street gang'" is statutorily defined as a group "having as one of its primary activities the commission of one or more" enumerated criminal acts. (§ 186.22, subd. (f).)[2] This statutory language requires "that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations";

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2 Under section 186.22, a sentence enhancement will be assessed to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) The statute defines a "'criminal street gang'" to be "any ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of one or more [enumerated] criminal acts [and] having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

evidence that gang members engage in the "occasional" commission of the enumerated crimes is insufficient. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322-323 (*Sengpadychith*).) In evaluating this question, the trier of fact may consider expert opinion testimony about the subject gang as well as any other evidence that the gang's members have committed statutorily enumerated crimes, including evidence of the offense for which the defendant is on trial. (*Ibid.*)

There are 30 crimes enumerated in the criminal street gang statute, any of which, if committed with sufficient regularity by the members of a particular gang, will support a jury's finding that a gang is a "criminal street gang." (§ 186.22, subds. (f) & (e)(1)-(30).) The jury's instruction in the instant case, however, limited its consideration to only four statutorily enumerated offenses: murder, carjacking, robbery, and shooting at an inhabited dwelling or vehicle. (§ 186.22, subds. (f) & (e)(1)-(30).)[3]

In conducting our review of the record for substantial evidence, we "'review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable

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3 In its instructions, the court, without objection, defined "criminal street gang" as an organization "having as one of its primary activities the commission of one or more of the following criminal acts: murder, carjacking, robbery, shooting at an inhabited dwelling or vehicle[.]" (See *People v. Kunkin* (1973) 9 Cal.3d 245, 251 (*Kunkin*) [reviewing court must examine whether substantial evidence supports jury's finding in light of the instructions the jury received].) The record is silent as to why these crimes were included and other crimes listed in the statute that were supported by evidence at trial, such as vehicle theft, terrorist threats, illegal possession and transfer of firearms, felony vandalism, and intimidation of witnesses, were omitted.

doubt.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 630.) Particularly significant for our conclusion in this case, we must view the jury's finding in light of the instructions it received, as we "cannot look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule." (*Kunkin*, *supra*, 9 Cal.3d at p. 251 [concluding that substantial evidence did not support jury verdict even though evidence might have been sufficient under theory on which the jury was not instructed]; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1145 [verdict may not be upheld on theory not presented to jury because "[i]t would deprive the defendant of his right to a jury trial if an appellate court could [affirm a conviction] on a theory not presented to the jury," citing *People v. Abbott* (1933) 132 Cal.App. 109, 114], disapproved on other grounds by *Baluyut v. Superior Court* (1996) 12 Cal.4th 826.) Consequently, our review for substantial evidence is limited to determining whether there was sufficient evidence for the jury to find, pursuant to its instructions, that one of the Paradise Hills gang's primary activities was the commission of one or more of the crimes of murder, carjacking, robbery and/or shooting at an inhabited dwelling or vehicle.

B

The Evidence Was Insufficient to Support the Jury's Finding

Contending that there was sufficient evidence to support the jury's finding on the criminal street gang allegation, the Attorney General points to (i) records of conviction of crimes committed by Paradise Hills gang members and (ii) the testimony of a prosecution expert witness regarding the activities of the Paradise Hills gang. Our independent

review of the record, including the evidence cited by the Attorney General, reveals that the jury's finding is not supported by substantial evidence.

We begin by noting that the three records of convictions of Paradise Hills gang members introduced into evidence by the prosecution, and cited by the Attorney General, are irrelevant to our analysis because the criminal offenses involved are not encompassed within the scope of the jury's charge. While two of the three records of convictions entered into evidence concern crimes listed in the criminal street gang statute (felony vandalism and terrorist threats), none of the convictions is for a crime listed in the jury's instruction. Thus, these records of conviction do not provide substantial evidence for the jury's finding in this case — that one of the Paradise Hills gang's primary activities is the commission of the crimes of murder, carjacking, robbery or shooting at inhabited dwellings/vehicles. (*Kunkin*, *supra*, 9 Cal.3d at p. 251; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1004 (*Nathaniel C.*) [it is not sufficient to show "that criminal conduct is a primary activity of the [gang]"; "the statute's focus is much narrower than general criminal conduct; evidence must establish that a primary activity of the gang is one or more of the listed offenses"].)[4]

The second source of evidence relied on by the Attorney General to support the jury's finding, expert testimony, suffers from a different but equally significant flaw. In

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4 The prosecutor also attempted to introduce the record of a 2002 robbery conviction suffered by Aguilar while he was a Paradise Hills gang member, but the trial court excluded that evidence as unduly prejudicial because Aguilar was implicated in the current offense. The Attorney General does not rely on, or reference, the evidence of Aguilar's robbery conviction on appeal.

the prosecution's case-in-chief, San Diego Police Detective Felix Aguirre testified generally about gang behavior,[5] and in testimony highlighted by the Attorney General on appeal, stated: "Since I became involved with the Paradise Hills gang, I have been involved in the investigation of an assortment of crimes: vandalism, burglaries, auto thefts, robberies, attempted murders, murders, victim witness intimidation, and things of [that] sort."

The sole case relied on by the Attorney General, *People v. Gardeley* (1996) 14 Cal.4th 605, 620, for the proposition that Detective Aguirre's testimony was sufficient to support the jury's finding on the gang allegation, in fact demonstrates the failing of the expert testimony in this case. In *Gardeley*, our Supreme Court found sufficient evidence to support a primary activity finding based on a prosecution witness's "expert opinion that the primary activity of the [subject] gang was the sale of narcotics," a statutorily enumerated offense. (*Ibid.*; *Sengpadychith, supra,* 26 Cal.4th at p. 324 [explaining that evidence in *Gardeley* was sufficient because "a police gang expert testified that the gang of which defendant Gardeley [was] a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies"].)

Detective Aguirre's testimony, which does reference two statutorily qualifying offenses that were included in the jury's instruction, "murders" and "robberies," is

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5 While the Attorney General highlights some of this generic testimony on appeal, testimony that does not "relate specifically to the [subject gang] and its activities" fails to establish a primary activity of the subject gang. (*Nathaniel C., supra,* 228 Cal.App.3d at p. 1005.)

nevertheless markedly different from the testimony found sufficient in *Gardeley*. Detective Aguirre never testified that *a primary activity* of the Paradise Hills Street gang is engaging in statutorily enumerated offenses. Rather, he testified that after he "became involved with the Paradise Hills gang," he was "involved" in "investigation[s]" of such offenses. The prosecutor failed to follow up on the detective's answer to determine whether the "investigation[s]" cryptically referenced were in fact *of* Paradise Hills gang members, whether these investigations resulted in a determination that Paradise Hills gang members had committed robberies and murders; and, if so, how many robberies and murders had been committed by Paradise Hills gang members and over what period of time. (Compare *People v. Vy* (2004) 122 Cal.App.4th 1209, 1225 [three violent felonies in three-month period sufficient to satisfy primary activities element] with *People v. Perez* (2004) 118 Cal.App.4th 151, 160 (*Perez*) [three shootings in a week-long period and beating six years earlier not sufficient].) While such clarification would generally be required considering the centrality of this evidence to the information's gang allegation and the prosecution's burden of proof, it was particularly essential here because Detective Aguirre had earlier testified that his investigations included cases where Paradise Hills gang members were the *victims* of crime — investigations that would not support the jury's finding. As it stood, Detective Aguirre's testimony required the jury to speculate as to whether and how often the Paradise Hill gang's members committed robberies and murders, and "'speculation is not evidence, less still substantial evidence.'"[6] (*People v.*

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6 The prosecutor relied solely on Detective Aguirre's testimony in arguing in closing

Waidla (2000) 22 Cal.4th 690, 735; *Nathaniel C., supra,* 228 Cal.App.3d at pp. 998, 1004-1005 [reversing jury's § 186.22 finding as insufficiently supported by expert's testimony that "the primary activity of all gangs in his area was criminal, including [the statutorily enumerated offense of] assaults with deadly weapons" coupled with testimony that gang members committed two previous assaults with a deadly weapon, because the expert did not specify that the subject gang was one of the gangs in his "area"].)[7]

In sum, our review of the record requires us to conclude that the evidence in the instant case was insufficient to support the jury's finding that one of the Paradise Hills gang's "'chief'" or "'principal'" activities was the commission of the crimes enumerated for the jury — murder, carjacking, robbery and/or shooting at an inhabited dwelling or

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argument that the Paradise Hills gang was a criminal street gang. She contended Detective Aguirre "told us the [Paradise Hills] gang's primary activities: felony vandalisms, murders, attempted murders, witness intimidation, burglaries . . . ." The Attorney General properly recognizes that this overstates Detective Aguirre's testimony, but nevertheless quotes this portion of the prosecutor's closing argument as support for the jury's finding. The closing argument of the prosecutor is not evidence, and the prosecutor's statement here, which suggested that Detective Aguirre's testimony was stronger than it actually was, undermines rather than supports the jury's finding.

7 In addition to the expert testimony and the records of conviction introduced by the prosecution, there was a third area of evidence that could have been relied on by the jury, "the circumstances of the charged crimes." (*Sengpadychith, supra,* 26 Cal.4th at p. 320; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 ["the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus . . . may be considered by the jury on the issue of the group's primary activities"].) Here, the facts of the charged crime provided evidence that a Paradise Hills gang member, Mendiola, engaged in a carjacking and murder — two of the offenses listed for the jury's consideration. Nevertheless this evidence, while relevant, *by itself* proves at most "the occasional commission of th[e]se crimes by the group's members" and is therefore insufficient under *Sengpadychith*. (*Sengpadychith*, at pp. 323-324.)

vehicle. (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) Instead, the evidence supports at most a finding of "the occasional commission of those crimes by the group's members," which is insufficient under the statute.[8] (*Ibid.*; *Nathaniel C., supra,* 228 Cal.App.3d at pp. 1004-1005; *Perez, supra*, 118 Cal.App.4th at p. 160 [evidence of two earlier shootings and a beating by gang members along with the evidence of the instant offense, a murder by a gang member, "was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute,'" as required for a jury's finding under § 186.22].)[9]

II

The Trial Court Did Not Commit Reversible Error by Failing to Instruct on Involuntary Manslaughter or Assault

Mendiola contends that the trial court committed instructional error when it instructed the jury that evidence of his voluntary intoxication could be considered to

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8 Mendiola separately contends that the court improperly placed its imprimatur on Detective Aguirre's testimony by instructing the jury pursuant to CALJIC No. 17.24.2 that they "should consider" the "expert opinion evidence offered" in evaluating whether the gang allegation was proven. We recognize that this instruction is somewhat problematic in the context of this case, as Detective Aguirre was the only expert who testified. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1136, fn. 6 ["When the proposed instruction focuses exclusively or primarily on the testimony of one witness, it runs afoul of [the rule] that it is '"improper for the court to single out a particular witness and to charge the jury how his evidence should be considered"'"].) Nevertheless, in light of our reversal of the jury's finding on the gang enhancement, we need not reach this question.

9 As the finding is reversed, we need not reach Mendiola's contention under *Lopez, supra,* 34 Cal.4th 1002, 1005, that the trial court improperly applied the finding at sentencing.

negate the specific intent required for murder and carjacking, but failed also to instruct the jury that, if it so found, it could still find Mendiola guilty of the lesser offenses of involuntary manslaughter and assault. We determine that in light of the jury's other findings regarding his intent, any instructional error in this regard was harmless, and therefore reversal is not warranted.

At Mendiola's request, the court instructed the jury that evidence of voluntary intoxication (Mendiola's methamphetamine use) was relevant to the determination of whether he had the requisite specific intent to commit murder or carjacking.[10] (See *People v. Roldan* (2005) 35 Cal.4th 646, 715 [a defendant is entitled to an instruction on voluntary intoxication "'when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent"'"].) The trial court rejected Mendiola's separate request for an instruction on the

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10 In addition to instructing the jury on the definition of voluntary intoxication, CALJIC No. 4.22, the court instructed the jury pursuant to CALJIC No. 4.21 as follows:

"In the crimes of Murder and Carjacking, . . . and in the allegation that these crimes were committed for the benefit of . . . a criminal street gang, a necessary element is the existence in the mind of the defendant is [*sic*] to have the specific intent to unlawfully kill another human being and the specific intent to unlawfully take either permanently or temporarily the motor vehicle of another accomplished by force or fear. It must also be shown that the above crimes were committed with the specific intent to promote or assist in criminal conduct by street gang members.

"*If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required specific intent and or mental state.*" (Italics added.)

lesser offense of involuntary manslaughter and also did not instruct on the lesser offense of assault.[11]

Citing the general principle that if a court "instruct[s] on the relevance of intoxication, . . . it has to do so correctly" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134), Mendiola contends the trial court's voluntary intoxication instruction was flawed because it was only a "partial[]" instruction, "omitting the critical instructions relating to the offenses resulting from the negated mental states." He argues that "when the court instructs that the specific intent of a given offense may be negated by a defendant's intoxicated state, the court must then also explain just what offense the defendant would be guilty of were the jury to find that the defendant did not have the requisite mental state." While there is some logic to Mendiola's legal contention, we need not decide whether the failure to give voluntary manslaughter or assault instructions in this case was error because any such error was necessarily harmless: the jury separately resolved the factual question posed by the instructions Mendiola contends were erroneously omitted adversely to him.

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[11] Mendiola's contention is not that the trial court had a sua sponte duty to instruct on the lesser included offenses of involuntary manslaughter or assault (arguably a lesser included offense of carjacking in this case by virtue of the information). (See *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Rather, he contends that the trial court's duty to instruct on involuntary manslaughter and assault arose from its decision to instruct on voluntary intoxication. He summarizes that "the question appellant brings to this court is whether a court, when instructing on voluntary intoxication, must also instruct on the corresponding offense should the jury find in accordance with the intoxication instructions."

Reversal for instructional error is not warranted where "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1028 (*Edelbacher*).) "'In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding'" under the omitted instruction "'has been rejected by the jury.'" (*Ibid.*)

The factual question posed by the omitted instructions here was whether Mendiola's methamphetamine use rendered him "unconscious," at the time he shot Pagayon and took his car — i.e., whether because of his methamphetamine use Mendiola was "'"physically act[ing] in fact but [wa]s not, at the time, conscious of acting."'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 424 (*Ochoa*).)[12] The record reveals that the jury unequivocally answered this question adversely to Mendiola.

The jury, on proper instruction, made four separate special allegation findings that are irreconcilable with any suggestion that Mendiola shot Pagayon and carjacked his vehicle while in an unconscious state. The jury found that: (1) Mendiola committed the murder "*with the specific intent* to promote, further and assist in criminal conduct by gang

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12 "'When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter.' [Citation.] Unconsciousness does not mean that the actor lies still and unresponsive. Instead, a person is deemed 'unconscious' if he or she committed the act without being conscious thereof." (*People v. Haley* (2004) 34 Cal.4th 283, 313, quoting *Ochoa, supra,* 19 Cal.4th at pp. 423-424.)

members"; (2) Mendiola committed the murder while "engaged in the commission . . . of the crime of Robbery or the related crime of Carjacking"; (3) that in the commission of the murder, Mendiola "*intentionally* . . . discharge[d] a firearm"; and (4) in the commission of the carjacking, Mendiola "*intentionally* . . . discharge[d] a firearm." (All italics added.) Each of these findings demonstrates that the jury categorically rejected Mendiola's contention that he acted in a state of unconsciousness, a prerequisite to any finding that he had committed only the lesser offenses of manslaughter and assault.[13] Given these findings, controlling case law requires us to conclude that the omission of

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13 In his opening brief, Mendiola cites *Ochoa*, *supra*, 19 Cal.4th at page 424, for the proposition that a person who voluntarily intoxicates themselves into an unconscious state and then kills, i.e., a person who "'"physically acts in fact but is not, at the time, conscious of acting," '" is guilty only of voluntary manslaughter. (See CALJIC No. 8.47 ["If you find that a defendant, while unconscious as a result of voluntary intoxication, killed . . . without an intent to kill . . . the crime is involuntary manslaughter. This law applies to persons who are not conscious of acting but who perform acts or motions while in that mental state"].) In his reply brief, however, Mendiola emphasizes that intoxication short of "unconsciousness" would also justify such an instruction. Mendiola relies on *People v. Webber* (1991) 228 Cal.App.3d 1146, 1164, for this contention, but *Webber*'s formulation of a state short of unconsciousness — "acting like an automaton, robot-like or in a trance or dazed, i.e., that the body was moving without the mind," appears no different from that used in *Ochoa* to define unconsciousness. In any event, assuming there is a discernable distinction between the two mental states (unconsciousness and a nonculpable state short of unconsciousness), the distinction is insignificant here. We can imagine no theory, and Mendiola suggests none, by which the jury could have found Mendiola's voluntary intoxication permitted him to form certain specific intents (e.g., the specific intent to promote criminal conduct by gang members), but not others (e.g., the intent to commit carjacking or murder). (See *People v. Cain* (1995) 10 Cal.4th 1, 45 (*Cain*).) Thus, the jury's four special findings that Mendiola possessed specific criminal intents in committing his crimes constitutes a categorical rejection of the evidence regarding voluntary intoxication, whether the standard is unconsciousness as urged in Mendiola's opening brief or something short of unconsciousness, as he urges in his reply brief.

instructions on these offenses, even if erroneous, was harmless.[14] (*People v. Heard* (2003) 31 Cal.4th 946, 982 [omission of instruction on involuntary manslaughter due to intoxication harmless where jury also convicted defendant of sexual offenses, which required specific intent, and consequently, "the jury necessarily determined that defendant formed the requisite specific intent despite his consumption of drugs and alcohol" and so "could not have concluded he was unconscious and therefore guilty only of involuntary manslaughter"]; *Cain*, *supra*, 10 Cal.4th at p. 45 [jury's special circumstance findings that intoxicated defendant intended to kill victim renders any instructional error with respect to intent to rape harmless because "[n]o evidence was presented from which a jury rationally could have found defendant, despite his asserted intoxication, intended to kill [victim], but because of that same intoxication did not form the intent to rape [her]"]; *Edelbacher*, *supra*, 47 Cal.3d at pp. 1028-1029 [finding any instructional error in murder case harmless where special circumstance findings demonstrated that jury necessarily rejected defendant's contention regarding the absence of intent]; see also *People v. Earp* (1999) 20 Cal.4th 826, 886 [jury finding of special-circumstance allegations, that defendant killed victim while perpetrating rape and lewd conduct with a child under age 14, renders omission of instruction on lesser included

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14 The jury was instructed: "[Y]ou may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion"; and "if the evidence as to any specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent."

offense of involuntary manslaughter harmless because "the jury necessarily determined that the killing . . . was first degree felony murder . . . and not any lesser form of homicide"].)[15]

III

The Special Circumstance Finding That Mendiola Committed the Murder While Engaged in Robbery or Carjacking Is Not Invalid

Mendiola contends that the jury's section 190.2, subdivision (a)(17) special circumstance finding that he committed the murder while "engaged in the commission . . . of Robbery or the related crime of Carjacking" is invalid on two grounds. He contends that: (i) there is a possibility that the jurors did not unanimously agree on which offense served as the basis for its finding; and (ii) to the extent the jury based its finding on the offense of carjacking, that finding is "unlawful" because it varies from the allegation charged in the information. We reject both contentions.

Under section 190.2, subdivision (a), a defendant found guilty of first degree murder along with a special circumstance finding in that section, must be sentenced either to death or imprisonment for life without the possibility of parole. Among the special

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15 At trial, Mendiola did not rely on his methamphetamine intoxication to explain his actions. Instead, he claimed he was alone in Pagayon's car when someone else shot Pagayon. Similarly, Mendiola's counsel did not argue that Mendiola acted while unconscious or semi-unconscious, but rather contended in closing argument that the evidence that Mendiola shot Pagayon was not credible, that Mendiola's confession was coerced, and that the evidence revealed "a possibility that someone else committed this crime and not Mr. Mendiola," specifically "a Black male" or "a Filipino or Filipino individuals" who may have been in the area.

circumstances enumerated in that section are that the murder was committed while the defendant was engaged in certain felony offenses, including robbery and carjacking.[16]

The information filed against Mendiola alleged a special circumstance under section 190.2, subdivision (a)(17) — that Mendiola murdered Pagayon while "engaged in the commission and attempted commission of the crime of Robbery, in violation of [sections] 211 or 212.5, within the meaning of [s]ection 190.2(a)(17)." The jury returned a true finding on the verdict form provided by the court that was slightly different from that charged in the information, finding that Mendiola murdered Pagayon while "engaged in the commission and attempted commission of the crime of Robbery *or the related crime of Carjacking*, in violation of [sections] 211 or 212.5, within the meaning of [s]ection 190.2(a)(17)." (Italics added.)

Mendiola first contends that the special finding as stated on the verdict form is invalid on unanimity grounds. He argues the jury may "simply [have] found the underlying offense to be one or the other," carjacking or robbery, "without unanimously agreeing as to which offense actually was the underlying offense."

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16 Section 190.2 states:

"(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶]

"(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

"(A) Robbery in violation of Section 211 or 212.5. [¶] . . . [¶]

"(L) Carjacking, as defined in Section 215."

As the parties note, our Supreme Court has not resolved the question of whether a jury finding on a special circumstance allegation requires a unanimity instruction. (*People v. Davis* (2005) 36 Cal.4th 510, 563 [the court has "assumed, without deciding, that the unanimity requirement applies to special circumstances," but has "never so held"].) Nevertheless, this issue is not presented here because the trial court specifically instructed the jury that to find this special circumstance, it had to determine that the murder was committed in the commission of a *carjacking*.[17] As we must assume that the jury followed the instructions it was given (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17), we cannot conclude that the special circumstance fails because the jurors did not unanimously agree, as instructed, that the predicate crime was carjacking.

Mendiola next contends that the special circumstances finding is unlawful because the language in the verdict form deviated from the language in the information.[18]

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17 The court instructed the jury that:

"To find that the special circumstance referred to in these instructions as murder in the commission of Robbery is true, it must be proved:

"1a. The murder was committed while the defendant was engaged in the commission or attempted commission of the crime of *carjacking*; or

"1b. The murder was committed during the immediate flight after the commission or attempted commission of a *carjacking* by the defendant; and

"2. The murder was committed in order to carry out or advance the commission of the crime of *carjacking* or to facilitate the escape therefrom or to avoid detention [*sic*]. In other words, the special circumstance referred to in these instructions is not established if the *carjacking* was merely incidental to the commission of the murder." (Italics added.)

18 The parties erroneously agree that Mendiola failed to object to this variance below, Mendiola's attorneys did object on this ground below; thus, contrary to the Attorney General's contention, the claim is not forfeited. (See, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 427 ["defendant has forfeited his right to object to an alleged

Mendiola recognizes in his appellate brief that given the variance at issue and the charges against him, this argument is essentially "a technicality," but contends that we must hold the prosecution to "strict adherence" to proper pleading requirements. While we do not condone what appears to have been an easily avoidable mistake by the prosecution, more than "a technicality" is required to warrant reversal.

Case law requires a showing of prejudice for reversal: Mendiola, however, "has failed to show or even assert that he was prejudiced by the variance." (*Maury*, *supra*, 30 Cal.4th at p. 427 [reversal not warranted based on "'variance in an information'" if "'the pleading so fully and correctly informs a defendant of the offense with which he is charged that, taking into account the proof which is introduced against him, he is not misled in making his defense'"]; cf. § 960 ["No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits"].) There is no basis to conclude that Mendiola was misled about the charges against him because of the variance between the information and the verdict form. In fact, the operative information filed against Mendiola itself provided sufficient notice that the prosecution intended to prove he murdered Pagayon in the process of committing a carjacking.

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variance between the pleading and the proof by failing to raise the objection in the trial court"].)

The operative information filed against Mendiola contained a count of both the murder of Pagayon (count 1), which included the "robbery" special circumstance allegation challenged here, and a count of carjacking Pagayon's vehicle (count 2). Count 2 included a separate special allegation that Mendiola intentionally and personally discharged a firearm causing the death of a person in the commission of the carjacking — referred to there as "the above offense." Assuming for the sake of argument that the two counts of murder and carjacking, on the facts of this case, did not by themselves sufficiently place Mendiola on notice that the prosecution would seek to prove he committed a murder in the commission of a carjacking, the special allegations in count 2 of the information clarified this question beyond any doubt. Consequently, we do not see, and Mendiola fails to explain, how the information filed against him failed to place him on sufficient notice that the prosecution would seek to prove what the jury ultimately found — that Mendiola murdered Pagayon in the commission of carjacking his vehicle. Consequently, the variance between the special circumstance allegation and the verdict form does not warrant reversal. (*Maury, supra,* 30 Cal.4th at p. 427; *People v. Thomas* (1987) 43 Cal.3d 818, 828 [reversal based on variance between information and verdict not warranted where defendant "has not demonstrated he was prejudiced by the admittedly inartful wording of the information"].)[19]

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19 Mendiola cites statutory language regarding section 190.2 that references the "charged" or "alleged" special circumstances in describing the substance or procedure of proving such allegations. We do not read this statutory language, some of which is from outdated statutory sections that were amended prior to Mendiola's offense, as requiring us to ignore the well-established rule that an "immaterial" variance between the charging

IV

Reversal Is Not Warranted for Alleged Prosecutorial Misconduct in Closing Argument

Mendiola contends that the prosecutor committed error in closing argument by referencing everyday occurrences to explain the concepts of premeditation and deliberation to the jury. Without expressing any opinion as to the propriety of the prosecutor's statements, we disagree that the statements warrant reversal.

Expanding on the standard jury instruction that premeditation and deliberation can occur "in a short period of time" (CALJIC No. 8.20), the prosecutor told the jury that the requisite intent to kill for first degree murder could form in the time it takes to snap one's fingers or decide to go through a yellow light at an intersection. Mendiola contends that these arguments "trivialize[] what is otherwise a most serious and complex legal concept" and constitute prosecutorial misconduct requiring reversal. We reject Mendiola's contention on two grounds.

First, Mendiola's challenge to the prosecutor's statements in closing argument are forfeited by his failure to object below. "When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them

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document and the verdict form does not warrant reversal. (*Maury*, *supra*, 30 Cal.4th at p. 428; Pen. Code, § 960; cf. Cal. Const., art. 6, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].)

to the court's attention by a timely objection. Otherwise no claim is preserved for appeal." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44 (*Morales*).)

Mendiola concedes that he did not object below to the prosecutor's comments, but claims that he has not forfeited this claim because any objection would have been futile. The futility exception cited by Mendiola, however, applies only in narrow and extreme circumstances as were present in one of the few cases to apply the exception, *People v. Hill* (1998) 17 Cal.4th 800, 820. In *Hill*, the trial court repeatedly dismissed and expressed disdain for defense counsel's objections in front of the jury, allowing counsel to forego further objection because "if he persisted in objecting[, he] would risk additional critical comments from the bench that would suggest to the jury the trial court believed [he] was unnecessarily prolonging the proceedings by interposing 'meritless' objections." (*Id.* at p. 822; *People v. Riel* (2000) 22 Cal.4th 1153, 1213 ["normal rule requiring an objection applies" except in "extreme circumstances" such as those in *Hill*].)

The circumstances here do not in any way approximate those that existed in *Hill*. Mendiola's counsel did not object at all during closing argument, and there is "nothing in the record that suggests an objection would have been futile." (*People v. Cole* (2004) 33 Cal.4th1158, 1201 [any error based on misconduct in prosecutor's closing argument forfeited by failure to object, and not excused by claim that objection would have been futile because counsel "made *no objections whatever* to the various instances of asserted misconduct," *id*. at p. 1202].) Mendiola's speculation that the trial court would have overruled any objection because such illustrations as that used by the prosecutor have

become general practice or are unaddressed by controlling legal authority is not the type of extreme circumstance that can excuse a failure to object under *Hill*.[20]

Second, reversal would not be warranted even if this challenge had been preserved by an objection below. In light of the overwhelming evidence against Mendiola, the prosecutor's comments, even if improper, could not have contributed materially to the verdict. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396-397 [reversal for prosecutorial misconduct in closing argument only proper if "'the misconduct can be said to have contributed materially to the verdict in a closely balanced case or is of such a nature that it could not have been cured by a proper and timely admonition'"]; *People v. Morales, supra*, 25 Cal.4th at p. 47 [reversal not warranted based on erroneous statements of law by prosecutor in closing argument because, inter alia, court "presume[s] that the jury relied on the [court's] instructions, not the arguments, in convicting defendant"].) Further, any prejudice from the prosecutor's comments was mitigated, if not completely removed, by the jury's instruction that it must follow the court's instructions, not the

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20 If it is indeed the case as Mendiola claims that these analogies "have become so standard that [they are] now universally presumed" to be appropriate, Mendiola's counsel could have sought a ruling prior to closing argument which would have preserved his objection while at the same time eliminated any "risk of the court placing its imprimatur on the prosecutor's presentation" in front of the jury. Further, any prejudice from the prosecution's argument could have been cured by an instruction to the effect that the law regarding premeditation was defined for the jury in the court's instructions, not in the arguments of counsel — an instruction Mendiola's counsel could have requested outside the presence of the jury.

attorneys' statements of the law, as well as Mendiola's counsel's emphasis of this instruction in his closing argument.[21]

DISPOSITION

The true finding on the criminal street gang allegation under section 186.22, subdivision (b)(1) is reversed and the 10-year sentence enhancement imposed for that allegation on count 1 is stricken. The judgment is affirmed in all other respects. The cause is remanded to the trial court with instructions to dismiss the petition's special allegation of a violation of section 186.22, subdivision (b)(1). The trial court shall then amend the abstract of judgment accordingly and forward it to the Department of Corrections.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

MCINTYRE, J.

21 Mendiola's counsel stated to the jurors that the prosecutor "spent a great deal of time talking . . . about the law," but "the judge instructs on the law" and the jury would receive written copies of the judge's instructions; "Read those. That's what applies, not what the lawyers say." This argument referenced the court's earlier instructions — which as counsel indicated were given to the jurors in hard copy form — that: "You must accept and follow the law as I state it to you . . . . If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions."